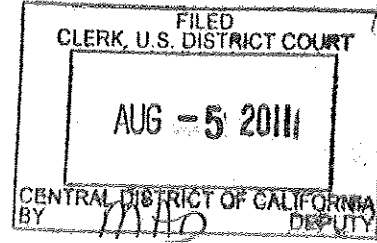


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Attorney for Objector Michelle Melton

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

KAMBIZ BATMANGHELICH, on behalf
of himself and all others similarly situated,
and on behalf of the general public,

Plaintiffs,

v.

SIRIUS XM RADIO, INC., a Delaware
corporation, STREAM
INTERNATIONAL INC., a Delaware
corporation, and DOES 3 through 50,
inclusive,

Defendants.

Case No. 09-cv-9190-VBF (JCx)

**OBJECTION OF MICHELLE
MELTON TO PROPOSED
SETTLEMENT AND NOTICE OF
INTENT TO APPEAR**

Date: September 12, 2011
Time: 1:30 p.m.
Place: Courtroom 9
Judge: Hon. Valerie Baker Fairbank

COMES NOW, MICHELLE MELTON ("Objector,") Class Member in this
action, by and through her undersigned counsel, to hereby file this Objection to the
Proposed Class Action Settlement, give notice of her counsel's intent to appear at the
September 12, 2011 at 1:30 p.m. before the Honorable Valerie Baker Fairbank in

1 Courtroom 9 of the United States District Court for the Central District of California,
2 located at 312 North Spring Street, Los Angeles, California, 90012.

3
4 The above referenced Objector is a Class Member in the above titled action as she
5 is/was a Sirius XM user, who either called or received a telephone call from Defendants
6 during the relevant time period, was not given notice that her call was being recorded,
7 and resides in either California, Nevada, New Hampshire, Florida, and/or Maryland.
8 Upon request, Objector's counsel will provide proof of class membership to Counsel or
9 the Court but for privacy reasons, redact such information in the instant submission.
10
11

12 In support of her objection, Objector states as follows:

13
14 **I. SUMMARY OF OBJECTIONS**

15 For the following reasons, this Objector states that the Settlement Agreement is not
16 fair, reasonable and adequate.
17

- 18 1. The attorneys' fee request is excessive because it is not based on the actual
19 value provided to the class;
- 20 2. The multiplier requested by the Motion for Attorneys' Fees is excessive
21 given a review of the facts of this case; AND
22
- 23 3. The Claim Form that class members are required to fill out is a deterrent to
24 making a claim as it requires sensitive, personal information be submitted to
25 Defendant over the internet.
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II. THE COURT MUST ACT AS FIDUCIARY ON BEHALF OF THE CLASS

Class actions may only be settled with court approval. Fed. R. Civ. P. 23(e). When the parties to a putative class action reach a settlement agreement prior to class certification, “courts must peruse the proposed compromise to ratify both the propriety of the certification and the fairness of the settlement.” *Staton v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir.2003). First, the Court must assess whether a class exists. *Id.* (citing *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 620 (1997)). Second, the court must determine whether the proposed settlement “is fundamentally fair, adequate, and reasonable.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir.1998).

The Court’s duty requires a review of the substance of the agreement and an investigation into the manner in which fees of class counsel are to be paid and the dollar amount for such services. *Id.* The 2003 Committee Notes to Rule 23(h) state that “[a]ctive judicial involvement in measuring fee awards is singularly important to the proper operation of the class-action process. Continued reliance on case law development of fee-award measures does not diminish the court’s responsibility. In a class action, the district court must ensure that the amount and mode of payment of attorney fees are fair and proper whether the fees come from a common fund or are otherwise paid. Even in the absence of objections, the court bears this responsibility.” Committee Notes to Rule 23(h), 2003.

1 Once a settlement is reached, both Class and Defense counsels' interests' change.
2 No longer vigorously advocating for their clients' interests, Class Counsel's interests are
3 inherently conflicted with the Class as they become another claimant to the very fund that
4 they have created for their clients. Defense Counsel, alternatively, cares naught for the
5 disbursement of fees to Class Counsel as payment of those fees will be deducted from the
6 sum total that their client is already paying. It matters little to Defense Counsel whether
7 Class Counsel takes 2% of the fund or 50% as the result is the same for their client in
8 either scenario. Thus, the Court necessarily becomes the fiduciary for the fund's
9 beneficiaries and must carefully monitor disbursement to the attorneys by scrutinizing fee
10 applications. *Skelton v. General Motors Corp.*, 860 F.2d 250, 253 (7th Cir. 1988), cert
11 denied, 493 US 810, 110 S. Ct. 53, 107 L. Ed. 2d 22 (1989.)

12 Accordingly, this settlement cannot be approved without the Court's
13 certification that the settlement and fee request are fair, reasonable, and adequate
14 for the Class.

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21 **A. This Attorneys' Fee Request is Likely Excessive Under the**
22 **Percentage of the Fund Method.**

23 Class counsel accurately states that this Court is entitled to utilize a percentage of
24 the fund methodology within this Circuit. *Paul, Johnson, Alston & Hunt v. Grauly*, 886
25 F.2d 268, 272 (9th Cir.1989). The Ninth Circuit has opined "we require only that fee
26 awards in common fund cases be reasonable under the circumstances." *Florida v. Dunne*,
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1 915 F.2d 542, 545 (9th Cir.1990). Based on the specific facts of this particular
2 settlement, it cannot be ascertained whether Class Counsel's requested 21 percent is
3 either an accurate or reasonable percentage until all class members' claims have been
4 tallied.

5
6 It is commonly known that claims' rates to class action settlements tend to be very
7 low. Average claims submission rates in similar class actions are typically ten percent or
8 less. *Walter v. Hughes Communications, Inc.*, 2011 WL 2650711, *13 (N.D.Cal., July 6,
9 2011.) See, e.g., *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 370
10 F.Supp.2d 320, 321 (D.Me.2005) (two percent submission rate); *Buchet v. ITT Consumer*
11 *Fin. Corp.*, 845 F.Supp. 684, 695 (D.Minn.1994), as amended 858 F.Supp. 944 (rejecting
12 settlement where similar settlement had only a three percent redemption rate); *Strong v.*
13 *Bellsouth Telecomm., Inc.*, 173 F.R.D. 167, 169 (W.D.La.1997) (4.3 percent claims rate);
14 *Burch v. United Cable TV of Baltimore Ltd. P'ship*, 732 A.2d 88 7 (Md.1999) (9.7
15 percent response rate to claims process); *Union Life Fid. Ins. Co. v. McCurdy*, 781 So.2d
16 186, 188 (Ala.2000) (observing that only 113 of 104,000 class members submitted
17 claims, for a rate of 0.1 percent). See e.g., *In re Compact Disc Minimum Advertised Price*
18 *Litig.*, 370 F.Supp.2d 320 (D. Me. 2005)(awarding attorneys' fees of 3% of value of
19 redeemed coupons which was 30% of claimed lodestar). See also, *In re Excess Value*
20 *Ins. Coverage Litig.*, 2005 U.S. Dist. LEXIS 45104 (SDNY 2006) at *28-33 (awarding
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1 class counsel fees in the amount of 50% of vouchers redeemed, which was 35% of
2 lodestar).

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4 The case of *Yeagley v. Wells Fargo & Co.*, 2008 WL 171083. (N.D. Cal. 2008), is
5 applicable to the situation before this Court. In *Yeagley*, the court confronted the task of
6 evaluating the value of a coupon settlement for the purpose of awarding attorney fees:
7

8 To award class counsel the same fee regardless of the claim
9 participation rate, that is, regardless of the enthusiasm of the
10 class for the benefits purportedly negotiated on their behalf,
11 would reduce the incentive in future cases for class counsel to
12 create a settlement which actually addresses the needs of the
13 class. In this case, for example, the one percent claim rate
14 demonstrates that the brochure did not effectively educate the
15 claim members about the importance of credit reports and
16 monitoring their credit ... Common sense dictates that a
17 reasonable fee in a class action settlement is a fee that takes into
18 account the actual results obtained... *Id.* at *9.

19 Thus, this Court should defer ruling on Class Counsel's attorney fee request until
20 all claims are made. This would only be a short delay as the claims period expires on
21 September 10, 2011. Only then can the amount of relief awarded be calculated to assure
22 that fees are paid according to relief actually received by Class Members.

23 **B. Under the Lodestar Method, a 3.2 Multiplier is Excessive Given the**
24 **Facts of this Case.**

25 Class Counsel asserts that a 3.2 multiplier is the average amount usually awarded
26 in cases such as this one and provides Ninth Circuit case law to support its position. (See
27 Motion for Fees, p. 8, ln. 18.) However, Class Counsel's use of the attorneys' fee chart
28

1 in Vizcaino is misplaced and not instructive in this matter as the settlements itemized in
2 this chart are dissimilar to the current situation. *Vizcaino v. Microsoft Corp.*, 290 F.3d
3 1043 (9th Cir. 2002).
4

5 The Vizcaino chart is inapposite here because it is a review of cases that settled for
6 between \$50 and \$200 million dollars. Here, the settlement value is significantly less
7 than that and, thus, the multipliers that correspond with the cases cited to in Class
8 Counsel's motion for attorneys' fees are inapplicable. More accurately, multipliers in
9 class actions with lower settlement values, involving shorter litigation periods, and where
10 the litigation was not a complex matter, like here, fluctuate in the more conservative
11 range of multipliers. See, e.g., *Van Vranken v Atlantic Richfield Corp*, 901 F Supp 294,
12 298 (ND Cal 1995) ("Multipliers in the 3-4 range are common in lodestar awards for
13 lengthy and complex class action litigation.") (emphasis added); *Behrens v Wometco*
14 *Enterprises, Inc*, 118 FRD 534, 549 (SD Fla 1988) ("[The] range of lodestar multiples in
15 large complicated class actions [varies from] a low of 2.26 to a high of 4.5."); see also *In*
16 *re Elan*, 385 F Supp 2d at 376 (reducing fee award from the requested 4.72 multiplier to a
17 multiplier of 3.47)
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23 The foregoing judicial observations are borne out in a study of common fund class
24 action fee awards compiled a few years ago. Beverly C Moore, et al, 24 Class Action
25 Reports, no 2 (March-April 2003). This study was compiled based upon the most
26 complex of complex actions; the securities fraud case. It included a review of 877 of
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1 these actions, 391 of which reported multiplier data. Of these 391 cases, 353 involved
2 class recoveries of \$50 million or less, the number applicable here. The review indicated
3 that the bulk of the multipliers spanned from zero to two with outliers in the 3.0 plus
4 range. Thus, Class Counsel's estimate that 3.2 is a conservative multiplier is not entirely
5 true.
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8 The facts of this case indicate that this was neither a lengthy nor particularly
9 arduous litigation. The bulk of the attorney work seemed to revolve around amending the
10 complaints and adding and removing parties. Although some discovery was conducted
11 and depositions were taken, no dispositive motions were filed and, in fact, the litigation
12 only lasted a little more than one year as the case was removed to federal district court on
13 December 15, 2009 and settled on February 14, 2011. Thus, this case does not entitle the
14 attorneys to such a significant and deferential multiplier, particularly given Objectors'
15 discussion in Section II(A).
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19 **C. The Request for Private Information on the Claim Form Will**
20 **Deter Participation.**

21 The Claim form requests that the class member claimant provide his name,
22 address, phone number, and social security number or tax id number. (See
23 Settlement Agreement, § 6.4.) There is no rational basis to request this type of
24 sensitive information other than as a means to dissuade class members from
25 submitting claims.
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1 The required information in the claim form is intrusive, a deterrent to class
2 members' making claims and, seems completely unnecessary given the
3 information that Defendant already possesses about each class member. As an
4 initial matter, Sirius intends to provide personal notice to most class members. The
5 Settlement Agreement at Section 6.5 provides, in relevant part, within "twenty-one
6 (21) days after the Court's Order granting preliminary approval of this settlement
7 and Agreement, Sirius XM shall compile the Class List and shall provide the
8 Claims Administrator with the following information for all persons in the Class
9 List: (a) name; (b) last known mailing address (if available); (c) last known email
10 address (if available); and (d) any additional email addresses (if available)."

15 This necessarily means that Defendant already possesses the capability to
16 discern membership to the class and information regarding each member in a far
17 less intrusive way than requiring a social security number submitted over the
18 internet. It seems unlikely that class members would have been required to
19 provide either their social security or tax identification number upon initiating their
20 contract with Sirius XM. Regardless, it is unclear why Defendant would need that
21 information now, rather than just relying on its records of names, account numbers,
22 addresses, and telephone numbers. Accordingly, the claim form should be revised
23 prior to approval of this settlement.
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1 **III. ADOPTION AND JOINDER OF ALL OTHER OBJECTIONS.**

2 This Objector joins in and adopts all well-taken, good-faith objections filed by
3
4 other Class Members in this case and incorporates them by reference as if they appeared
5 in full herein.

6 **WHEREFORE**, Objector respectfully requests that this Court:

7
8 A. Upon proper hearing, sustain these Objections;

9 B. Upon proper hearing, enter such Orders as are necessary and just to
10
11 adjudicate these Objections and to alleviate the inherent unfairness, inadequacies and
12 unreasonableness of the proposed settlement;

13
14 C. Award an incentive fee to this Objector for her service as a named
15 representative of Class Members in this litigation.

16
17
18 Dated: August 4, 2011

LAW OFFICES OF DARRELL PALMER

19
20 By: 

Darrell Palmer

21 Attorney for Objector, Michelle Melton
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1 **Kambiz Batmanghelich v. Sirius XM Radio, Inc., et al.**
2 **Case No.: 09-cv-9190-VBF (JCx)**

3 **DECLARATION OF SERVICE**
4 **UNITED STATES OF AMERICA, STATE OF CALIFORNIA**

5 I, Maria V. Carapia, declare as follows:

6 I am employed with the Law Offices of Darrell Palmer whose address is 603
7 N Hwy 101, Ste A, Solana Beach, CA 92075. I am readily familiar with the
8 business practices of this office for collection and processing of correspondence
9 for mailing with the United States Postal Service; I am over the age of eighteen
10 (18) and I am not a party to this action.

11 On August 4, 2011, I caused to be served the following:

12 **OBJECTION OF MICHELLE MELTON TO PROPOSED SETTLEMENT**
13 **AND NOTICE OF INTENT TO APPEAR**

14 on the interested parties:

15 SEE ATTACHED SERVICE LIST

16 _____ by placing a copy in a separate envelope addressed to each addressee
17 as indicated on the attached Service List and personally delivering it to
18 the above named persons.

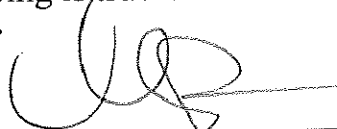
19 _____ by sending via electronic mail a true copy of the above-entitled
20 document to the email listed on the attached Service List. My email
21 address is maria.carapia@palmerlegalteam.com

22 _____ by sending a copy via overnight mail. Airbill No. _____.

23 X by placing a copy in a separate envelope, with postage fully prepaid,
24 for each address named on the attached Service List for collection and
25 mailing on the above indicated day following the ordinary business
26 practices of our offices

27 X by sending a copy via facsimile transmission to the facsimile
28 number(s) indicated on the attached Service List. The facsimile
machine I used complied with California Rules of Court, Rule 2003,
and no error was reported by machine.

I declare under penalty of perjury under the laws of the State of California of
the United States of America, that the foregoing is true and correct. Executed on
August 4, 2011, at Solana Beach, California.



Maria V. Carapia

SERVICE LIST

1

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